In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

WILLIAM M. O'KEEFFE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC., AND ROYAL INDEMNITY CO.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This supplement to the petition for a writ of certiorari is filed in order to invite the Court's attention to a recent decision of the Court of Appeals for the Fourth Circuit in *Pan American World Airways, Inc.* v. *O'Hearne*, July 13, 1964, set forth in the Appendix *infra*. That decision, we submit, is in clear conflict with the decision below.

The Fourth Circuit's opinion adopts and applies the more liberal standard previously followed in the Ninth Circuit, but rejected in the Fifth Circuit, with respect to what constitutes an injury or death aris-

ing out of and in the course of employment at an overseas defense base.

The claim for death benefits in the Fourth Circuit case arose out of the very same "jeep" accident as the claim for death benefits in the Fifth Circuit case of *United States* v. *Pan American World Airways*, 299 F. 2d 74, certiorari denied, 370 U.S. 918, discussed in our petition (pp. 7-8). The Fourth Circuit, fully aware of this, stated (App. *infra*, p. 7):

> The death of Smith's companion, Gondeck, was the subject of United States v. Pan American World Airways, Inc., 299 F. 2d 74 (5 Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome.

Examination of the evidence in both cases, as summarized in each of the court's opinions, shows that there is no significant difference between them.

It should be noted that in the instant case the Fifth Circuit reversed the award of compensation benefits on the express ground that it was "adher[ing] to the doctrine of the *Gondeck* [*Pan American*] case." Thus, the Fourth Circuit's open disagreement with the *Gondeck-Pan American* decision pointedly demonstrates that the Fourth Circuit's holding is also in direct conflict with the decision below.

CONCLUSION

For the reasons stated in our petition and in this supplement, it is respectfully submitted that the writ should be granted.

ARCHIBALD COX,
Solicitor General.

AUGUST 1964.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9340

Pan American World Airways Incorporated, and The Travelers Insurance Company,
Appellees,

versus

Stephen O'Hearne, Deputy Commissioner, Fifth Compensation District, U. S. Department of Labor, Bureau of Employees' Compensation,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK
WALTER E. HOFFMAN, DISTRICT JUDGE

(Argued June 12, 1964 Decided July 13, 1964)

Before BRYAN and BELL, Circuit Judges, and CRAVEN, District Judge.

* * * *

PER CURIAM:

An award under the Defense Bases Act, 42 U.S.C. 1651-1654, was made by the Deputy Commissioner to the widow and orphans of Robert M. Smith, an employee of Pan American World Airways, Inc., for his death on San Salvador (Watling) Island in the Bahamas, a British West Indies possession where Columbus first raised land. The fatality resulted when a jeep overturned in which the decedent was riding as a passenger with other employees for recreation. He had been hired by PAA as a powerhouse operator in its performance of a Government contract for the maintenance of Atlantic range facilities in connection with the United States Air Force Missile Test Center at Cape Kennedy, Florida.

Robert Smith's home and family were in Galax, Virginia, about 1000 miles distant. Pursuant to his engagement he was provided sleeping quarters and meals at the power station. Work occupied 8 hours each day but for any emergency he was subject to call during off-time. Tracking equipment was situated throughout San Salvador.

Aside from its remoteness, the island embraced only about 42 square miles—5 miles by 13 miles in its greatest dimensions. The population consisted of approximately 800 natives. British official personnel added another 50 individuals. The only settlement, Cockburn Town, was about three miles from Smith's dormitory.

Where Robert Smith was quartered PAA furnished the employees a pool room, an outdoor picture theatre, row boats, baseball and softball equipment. Of course, the Ocean and beach provided swimming, fishing and boating opportunities. Additionally, the Reef Club was maintained there at which alcoholic beverages could be purchased, and reading and card play-

ing enjoyed. The employer supplied no transportation for the workers to leave the site. Taxis were available, and on occasion upon request use of a jeep would be allowed by PAA for recreational trips.

On April 24, 1958, when Robert Smith had completed his regular assignment for the day, he went to the Reef Club, soon after 4 o'clock P.M. Except for time at dinner or supper, he remained there with three other co-employees drinking beer or champagne.

Around 7:30 P.M. they drove in one of the PAA's jeeps—whether with the tolerance of the employer is not clear—to a native pub in Cockburn Town, known as "Evelyn's" or the "Blue Marlin Club." Here they obtained another beer, returning to the jeep in about fifteen minutes. As they approached the base, the vehicle overturned from excessive speed or due to a defect in the road. Smith and another employee, Gondeck, were killed. Neither of them was the driver, intoxication was not ascribed as a factor in their deaths. The entire excursion occupied no more than a half hour.

The Commissioner concluded that the death of Robert M. Smith arose out of and in the course of his employment. Considering the distant place of employment, the sparsity of population and limited area of the island, the Commissioner determined that the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat. In the circumstances of his employment-residence, the Commissioner thought, Smith was only "doing what he [might] reasonably be expected to do." In short, that his brief exit was "an incident of the service".

PAA and its insurance carrier, The Travelers Insurance Company, successfully petitioned the District Court to vacate the conclusion and award as not vin-

dicated by the proof. The Commissioner appeals. Although some of the factual ascertainments made by the Commissioner may be without full support, we think substantial evidence undergirds his crucial and determinative fact findings. To these he applied correct and apt principles of law. Together they dictate the award.

Like the Commissioner, we see decision here designed and patterned in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951). Sustaining, too, is Self v. Hanson, 305 F.2d 699 (9 Cir. 1962). The death of Smith's companion, Gondeck, was the subject of United States v. Pan American World Airways, Inc., 299 F.2d 74 (5 Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome.

Upon the findings, conclusions and reasons stated by the Commissioner, we believe his award should be reinstated.

Reversed.

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